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IN THE

Supreme Court of the United States

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CHARLES ELMORE

OCTOBER TERM, 1932. No. 709

EASTMAN KODAK COMPANY, EASTMAN KODAK COMPANY OF NEW YORK, and EASTMAN KODAK STORES, INC.,

Petitioners,

v.

CHARLES B. GRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

Eastman Kodak Company, Eastman Kodak Company of New York, and Eastman Kodak Stores, Inc., Petitioners,

v.

Charles B. Gray, Respondent.

October Term, 1933.
No.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered August 22, 1933 (R., 234), reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania (R., 207). Petition for a rehearing was later filed (R., 235), and was denied on October 31, 1933 (R., 257).

A certified transcript of the record in the case, including the proceedings in the United States Court of Appeals for the Third Circuit, is furnished herewith in compliance with Rule 38 of the rules of this Court.

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action at law brought by respondent to recover damages for patent infringement. The patent is No. 1,314,867, issued to respondent September 2, 1919, for a flexible power-transmitting mechanism, particularly intended for use as a cable release, a well known device for actuating the shutter of a photographic camera.

The case was first tried before a jury and resulted in a verdict for respondent (R., 195). The trial judge, on motion of petitioners, set this verdict aside and ordered a new trial (R., 196).

Thereafter the parties, by a stipulation in writing, filed with the clerk of the District Court in accord with Section 649 of the Revised Statutes, agreed to waive a jury and to submit the case for trial and determination by the court. The stipulation provided for submission of the issues upon the record already made, subject to any objections there appearing, and also provided that all motions made by either party at the jury trial should be deemed made before the judge trying the case without the inter-

vention of a jury, both parties to have the right of appeal as in other cases (R., 197).

Pursuant to the stipulation, the cause came on to be heard by a judge of the District Court without a jury, upon the pleadings, the evidence, and the arguments and briefs of counsel, counsel for the respective parties offering in evidence the stenographic notes of testimony and minutes of proceedings taken at the jury trial (R., 29, 30).

The trial judge decided the disputed issues of novelty, invention, and infringement* in favor of petitioners (R., 205), and gave judgment accordingly (R., 207). The reasons therefor were stated in an opinion dealing generally with the issues submitted (R., 198-205).

Respondent appealed from the judgment entered against him and filed an assignment of errors containing six specifications (R., 209). The first five are addressed to the findings set forth by the trial judge at the end of his opinion.† The sixth is

* These issues were raised by plea of the general issue and by notice of special matters of defense (R., 21, 22, 24, 26, 27).

† These findings were as follows (R., 205):

"1. The combination of closed coil inner thrust member and open coil outer sheath member is not patentable because its elements were known to the prior art and no new mode of operation or functional relationship arises from putting them together."

"2. Claims 1 and 2 cannot be interpreted as calling for a closed coil inner thrust member in view of the file wrapper history of the patent."

"3. Claims 1 and 2 are anticipated."

"4. Claim 3 is not infringed."

"5. Claims 5 and 6 are invalid because United States patent No. 1,297,327, to Dakin and Underwood antedating the plaintiff's application discloses the method of attaching the thrust member to the stem claimed, and conclusion 'I' applies to these claims."

addressed to the order that judgment be entered for the defendant. Each specification is general, the style being the assertion that "The learned Trial Judge erred in finding as follows:", followed by quotation of the finding or order attacked.

Respondent also filed a bill of exceptions setting forth the evidence and the proceedings at the trial (R., 29-213), from which it appears that no request or motion was made, denied, and excepted to, or any other like action taken, which presented to the trial court the question whether there was any substantial evidence to sustain the findings challenged by the assignment of errors and secured the ruling of the trial court thereon during the trial. Respondent made no request for any findings of fact or for any rulings of law at any time, either during the progress of the first trial or the progress of the second trial, or even after the filing of the opinion ordering entry of judgment for petitioners.

Before the appeal was heard, petitioners filed a motion to dismiss the appeal and/or to affirm the judgment. The ground upon which the motion was based was that the assignment of errors presented no question reviewable by the Court of Appeals (R., 215). Decision on this motion was postponed until final hearing. (R., 218, 219)

In support of the contention that the Circuit Court of Appeals had no power to review the findings

challenged by the assignment of errors, it was urged that, by force of Section 649 of the Revised Statutes, the findings of the trial court are conclusive upon the issues of invention, anticipation, and infringement, if there is any evidence upon which they could be based; that whether or not the findings made upon those issues are supported by any substantial evidence is a question of law reviewable only when a request or motion has been made, denied, and excepted to, or some other like action taken which presented that question to the trial court and secured its ruling thereon during the trial, as required by Section 700 of the Revised Statutes; that the question whether there was any substantial evidence to support the findings made by the trial judge on the issues of invention, anticipation, and infringement was not raised by the respondent in this case either by a request for a ruling, by motion for judgment, or otherwise; and that the bill of exceptions filed fails to disclose the reservation of any exceptions to rulings of the court in the progress of the trial.

On final hearing, the Court of Appeals decided it had power, notwithstanding "the procedure in this case," to review the finding made by the trial court on the question whether what the patentee did required invention (Opinion R., 231, 233); and, holding there was no substantial evidence to support the trial court's finding (R., 233), reversed the judgment of the District Court.

QUESTIONS PRESENTED

The decision of the Circuit Court of Appeals presents the following questions:

1. Does an appellate court have power, in view of Section 649 of the Revised Statutes, to review a finding of the trial court upon the question whether an improvement requires mere mechanical skill or the exercise of invention, merely because there is no conflict in the evidence introduced to show what the improvement is and how it differs from what was in the prior art?

2. Does an appellate court have power, in view of Section 700 of the Revised Statutes, to review conclusions of law embodied in general findings on the issues of invention, anticipation, and infringement, made by a trial court in an action at law for patent infringement, in the absence of any action taken by appellant to present the question of law involved to the trial court and secure its ruling thereon during the progress of the trial?

3. Does an appellate court have power, in view of Section 700 of the Revised Statutes, to review general findings on the issues of invention, anticipation, and infringement, made by a trial court in an action at law for patent infringement, to determine whether there was any evidence upon which they could be based, when no ruling on that specific question was obtained during the progress of the trial, ex-

cepted to at the time, and duly preserved by a bill of exceptions?

4. Can a finding of no invention be set aside on the ground that there is no evidence on which it could be based where what the alleged improvement is and how it differs in structure and operation from what was in the prior art are fully established by evidence about which there is no dispute?

STATUTES INVOLVED

The statutes affecting the scope of review in cases tried and determined by a court without the intervention of a jury are Sections 649 and 700 of the Revised Statutes (28 U. S. Code Secs. 773, 875). R. S. Sec. 649 provides:

> "Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

R. S. Sec. 700 provides:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, accord-

ing to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The decision of the Circuit Court of Appeals that the question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is to be determined as a matter of law, rather than as a question of fact, where there is no conflict in the evidence introduced to show what the improvement is and how it differs from what was in the prior art, is in apparent conflict with the decisions of this Court in *Thompson Spot Welder Co.* v. *Ford Motor Co.*, 265 U. S. 445, 446, and *Keyes* v. *Grant*, 118 U. S. 25, 36, 37.

2. The decision of the Circuit Court of Appeals that it has power to review conclusions of law embodied in general findings made by the trial court is in direct conflict with the decisions of this Court in *Arthur C. Harvey Co.* v. *Malley*, 288 U. S. 415, and *Fleischmann Co.* v. *United States*, 270 U. S. 349.

3. The decision of the Circuit Court of Appeals that it has power to review the findings of the trial court to determine whether there was any evidence upon which they could be based is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Gerlach* v. *Chicago, R. I. etc. R. Co.*, 65 F. (2d) 862; and in apparent conflict with the decision of this Court in *Martinton* v. *Fairbanks,* 112 U. S. 670; and with decisions of the Circuit Courts of Appeals for the Fourth, Sixth, Eighth, and Ninth Circuits.

4. In deciding that testimony establishing what the alleged improvement was and how it differs in structure and operation from what was in the prior art affords no evidence upon which the trial court could base a finding of no invention, the Circuit Court of Appeals has decided an important question of patent law which has not been, but should be, settled by this Court.

WHEREFORE,—it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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Counsel for Petitioners.

IN THE

Supreme Court of the United States

Eastman Kodak Company, Eastman Kodak Company of New York, and Eastman Kodak Stores, Inc., Petitioners,

v.

Charles B. Gray, Respondent.

October Term, 1933.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURT BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, written by District Judge William H. Kirkpatrick, was filed July 13, 1932. It appears at page 198 of the record. It has not been reported. The opinion of the Circuit Court of Appeals for the Third Circuit (Circuit Judges Buffington, Davis, and Thompson), written by Judge

Buffington, was filed August 22, 1933. It appears at page 219 of the record and is reported in 67 F. (2d), 190.

JURISDICTION

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (28 U. S. Code, Sec. 347).

The judgment of the Circuit Court of Appeals for the Third Circuit which petitioners seek to have reviewed was entered August 22, 1933 (R., 234). Thereafter a petition for rehearing was filed (R., 235) which was denied on October 31, 1933 (R., 257).

STATEMENT OF THE CASE

The essential facts of the case are stated in the accompanying petition for a writ of certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the facts will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS

The errors which the petitioners will urge, if the writ of certiorari is issued, are that the Circuit Court of Appeals for the Third Circuit erred:

1. In holding that it had power to review the findings of the District Court on the questions of novelty, invention and infringement.

2. In holding that the findings of the District Court were not sustained by any substantial evidence.

3. In reversing the judgment of the District Court in favor of the petitioners.

SUMMARY OF ARGUMENT

The points of argument will follow the reasons relied upon for allowance of the writ of certiorari and will be discussed in the order set out in the petition (*ante*, pp. 8-9).

ARGUMENT.

I

The decision of the Circuit Court of Appeals that the question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is to be determined as a matter of law, rather than as a question of fact, where there is no conflict in the evidence introduced to show what the improvement is and how it differs from what was in the prior art, is in apparent conflict with the decisions of this Court in Thompson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 446 and Keyes v. Grant, 118 U. S. 25, 36, 37.

The decision of the Circuit Court of Appeals that it has power to review the findings made by the trial

judge on the issues of invention, anticipation, and infringement, was based in part upon the view that "there were no disputed facts" to be determined by the trial judge with respect to what the alleged improvement was and how it differs in structure and operation from what was in the prior art (R., 231), and that the question of invention was, therefore, to be determined as a matter of law, rather than as a question of fact upon which the finding of the trial court would be conclusive.

In support of this view, the Circuit Court of Appeals cited the decisions of this Court in *Heald* v. *Rice*, 104 U. S. 737; *Market Street R. Co.* v. *Rowley*, 155 U. S. 621, and *Singer* v. *Cramer*, 192 U. S. 265.

These cases, however, do not support the proposition to which they are cited. They merely hold that the question of *identity* may be a matter of law. Thus, in *Heald* v. *Rice* the validity of a reissued patent was challenged on the ground that the reissue patent was not for the same invention as the original patent. In *Market Street R. Co.* v. *Rowley*, the validity of the patent in suit was challenged on the ground that the inventions and devices described in prior patents disclosed the same invention as the patentee claimed. In *Singer* v. *Cramer*, the question was whether the Diehl device, upon which the charge of infringement was based, was substantially the same as that of Cramer.

But where *invention* is in issue, the question is not one of identity between the alleged improvement and what was in the prior art. Novelty over the prior art

is conceded, and the question is whether it required more than mere mechanical skill to make the change.

In *Thompson Spot Welder Co.* v. *Ford Motor Co.*, 265 U. S., 445, this Court said (p. 446):

> "The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention, *is one of fact;* and, in an action at law for infringement, is to be left to the determination of the jury. *Keyes* v. *Grant,* 118 U. S. 25, 36, 37; *Holmes* v. *Truman* (C. C. A.) 67 Fed. 542, 543; *Hall* v. *Wiles* (C. C.), 2 Bldtchf. 194, 11 Fed. Cas. 280, 283; *Poppenhausen* v. *Falke* (C. C.) 5 Bldtchf. 46, 19 Fed. Cas. 1052, 1054; *Shuter* v. *Davis* (C. C.), 16 Fed. 564, 566; *Blessing* v. *Copper Works* (C. C.), 34 Fed. 753, 754."

In *Keyes* v. *Grant,* 118 U. S. 25, this Court held that the question of invention was to be decided as a question of fact, and not as a matter of law, in a case where there was no dispute as to what the differences were between the improved furnace and the furnaces of the prior art.

II.

The decision of the Circuit Court of Appeals that it has power to review conclusions of law embodied in general findings made by the trial court is in direct conflict with the decisions of this Court in Arthur C. Harvey Co. v. Malley, 288 U. S. 415, and Fleischmann Co. v. United States, 270 U. S. 349.

In *Fleischmann Co.* v. *United States,* 270 U. S. 349, this Court, speaking of the effect of Section 700 of the Revised Statutes, said (pp. 355, 356):

"And it is settled by repeated decisions that, in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. [Citing Cases]

* * * * * * *

To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. *Norris* v. *Jackson, supra,* [9 Wall. 125], 129; *Martinton* v. *Fairbanks,* 112 U. S. 673. That is, as was said in *Humphreys* v. *Third Nat. Bank,* 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits.'"

In *Arthur C. Harvey Co.* v. *Malley,* 288 U. S. 415, this Court approved and applied the doctrine set forth in the above quotation.

In the case at bar respondent made no request for any findings of fact or for any rulings of law either during the progress of the first trial or the progress of the second trial, or even after the filing of the opinion written by the trial judge. Under the decisions of this Court in the two cases just cited, the only questions open to review under such circumstances are those arising on the pleadings. In this case, no point based upon the pleadings was presented by the assignment of errors.

III

The decision of the Circuit Court of Appeals that it has power to review the findings of the trial court to determine whether there was any evidence upon which they could be based is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Gerlach v. Chicago R. I., etc. R. Co., 65 F. (2d) 862; and in apparent conflict with the decision of this Court in Martinton v. Fairbanks, 112 U. S. 670; and with decisions of the Circuit Courts of Appeals for the Fourth, Sixth, Eighth, and Ninth Circuits.

In the case at bar respondent took no action to present to the trial court the question whether or not there was any evidence upon which the findings made by the trial judge could be based. The Circuit Court of Appeals decided, however, that this did not prevent it from reviewing the findings of the trial court on that ground (R., 233). This decision

is in direct conflict with a recent decision of the Circuit Court of Appeals for the Eighth Circuit.

That Court, in *Gerlach* v. *Chicago R. I. etc., Co.*, 65 Fed (2d) 862, held that the sufficiency of the evidence to support the findings made by a trial judge in a suit for patent infringement tried without a jury, is a question of law which arises in the progress of the trial, and, by force of Sections 649 and 700 of the Revised Statutes is reviewable *only* when properly raised during the trial and a ruling thereon obtained which is excepted to and preserved by the bill of exceptions.

The case before the Circuit Court of Appeals for the Eighth Circuit was an action at law brought to recover damages for the alleged infringement of patents, and was tried by the court without a jury. At the close of all the evidence, the court made findings of fact and conclusions of law in favor of the defendant, and entered judgment thereon dismissing the action upon its merits. On appeal, the appellant sought to have the Circuit Court of Appeals pass upon the sufficiency of the evidence to support the findings and conclusions made. The Court of Appeals refused to do so, pointing out that by virtue of the provisions of the Revised Statutes above referred to, it had no power to consider that question in the absence of any action by the plaintiff bringing the matter before the trial court.

In the following cases other Courts of Appeals have held, in cases not involving patents, that whether

there was substantial evidence to sustain the findings of a trial judge in cases tried without a jury is a question of law arising in the progress of the trial and is reviewable only when a ruling on that specific question is obtained during the progress of the trial either by motion for judgment at the close of the testimony or by a request for a declaration of law, excepted to at the time, and duly preserved by a bill of exceptions:

Fourth Circuit—*Peoples Bank* v. *International Finance Corp.*, 30 F (2d) 46; Sixth Circuit—*Humphreys* v. *Third National Bank*, 75 Fed 852; *Cleveland etc. Coal Co.* v. *Main Island Creek Coal Co.*, 297 Fed 60; *Oyler* v. *Cleveland etc., R. Co.*, 16 F. (2d) 455; Eighth Circuit—*U. S. Fidelity etc. Co.*, v. *Board of Commissioners*, 145 Fed. 144; *Wear* v. *Imperial Window Glass Co.*, 224 Fed. 60; *United States* v. *Atchison etc. R. Co.* 270 Fed. 1; *Allen* v. *Cartan & Jeffrey Co.*, 7 F. (2d) 21; *First National Bank* v. *Litteer*, 10 F. (2d) 447; Ninth Circuit—*Gillespie* v. *Hongkong & Shanghai Banking Corp.*, 23 F. (2d) 670; *Macomber* v. *Goldthwaite*, 22 F. (2d) 638; *Phoenix Securities Co.* v. *Dittmar*, 224 Fed. 892.

This Court in *Martinton* v. *Fairbanks*, said (p. 672):

> "If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a definite ruling on that point."

IV.

In deciding that testimony establishing what the alleged improvement was and how it differs in structure and operation from what was in the prior art affords no evidence upon which the trial court could base a finding of no invention, the Circuit Court of Appeals has decided an important question of patent law which has not been, but should be, settled by this Court.

The Circuit Court of Appeals held there was no evidence upon which the trial court could base a finding of no invention.

The ultimate response to the question whether a patentee has performed an inventive act must always be based upon a comparison of the alleged invention with what was in the prior art and ascertainment of the differences between them.

When facts which enable a court to make that comparison and ascertainment are fully established by evidence about which there is no dispute, a court has before it the proper basis for forming a judgment upon the issue of invention, and its decision, even though erroneous, cannot properly be characterized as unsupported by any evidence.

In the instant case, the evidence fully established the nature of the alleged improvement, the nature of the devices found in the prior art, and the differences in structure and operation between the alleged improvement and the prior art devices (R. 231).

Counsel for petitioners have been able to find no other case in which it has been held that such evidence fails to furnish a proper basis for determining the issue of invention against a patentee.

It is believed that this question of what evidence is sufficient to permit a fact finding body, whether judge or jury, to rest a decision holding a patent invalid for want of invention is one upon which it is important to have an authoritative pronouncement of this Court.

CONCLUSION

It is earnestly urged, therefore, that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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CHARLES W. RILEY

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Counsel for Petitioners.